Office Supreme Court, U.
FILED
MAY 12 1955
HAROLD B. WILEY, Clerk

No. [redacted] 70

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 11,475.

UNITED STATES OF AMERICA

vs.

DAVID SWIDLER,
Appellant.

APPEAL FROM THE JUDGMENT AND SENTENCE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA (CRIMINAL ACTION No. 16639).

ADDITIONAL APPENDIX FOR APPELLANT.

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RECEIVED & FILED
MAR 9 1955

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(146) M. SIMON.

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. Do you have any special interest in this case that might keep you from telling the truth?

A. None whatsoever, sir.

Q. By the way, am I correct in saying that before you took the witness stand you were reading the testimony that you gave two years ago; is that correct?

A. That is right, sir.

(147) Q. You were present at the trial two years ago when Mr. Kaufmann testified, is that correct, your former boss?

A. Correct, sir.

Q. And you were present when Mrs. Diamond or Peggy Mandelbaum, Mrs. Peggy Mandelbaum, also known as Peggy Diamond, testified; is that correct?

A. No, sir, I was not. I left and went to New York.

Q. You had already testified?

A. I had testified, that is right.

Q. So you didn't hear what she said?

A. No, I did not.

Q. Now I call your attention to the fact that despite your statement, you were present, because you testified after Peggy Mandelbaum testified, and, in fact, your attention was called to that. You did hear her testify. It is only two years ago.

A. I don't remember.

Q. Well, you stated you went to New York and you did not hear her testify.

A. I believe that is correct when I say that.

Q. I assure you it is not, and I can ——

A. I might be in error, but the way my mind goes right now ——

Q. I will allow the Assistant District Attorney to tell you now, to interrupt, whether you did leave or you didn't leave, (148) to refresh your memory.

A. I wish you would, please.

MR. KOSSMAN: I don't want to take advantage ——

MR. LEES: According to the notes of testimony, you did testimy after Mrs. Diamond testified.

THE WITNESS: Well, it seems to have slipped my memory entirely. I am not trying to evade anything.

BY MR. KOSSMAN:

Q. All right. Now, Mrs. Peggy Mandelbaum at that time testified, in answer to the question on direct examination on page 111, by the Assistant District Attorney, who asked her this question:

"Was he introduced to you by the name of Mr. Swidler or what?"

And Peggy Mandelbaum stated then:

"By the name of Mr. Swidler."

Now, you have no recollection that Mrs. Mandelbaum said that in court?

A. No, I have not.

Q. No recolection. Well, is this the first time your attention has been called to it?

A. Oh, yes.

Q. Let us go back. You were asked this question on cross- (149) examination, page 124. Mr. Swidler's lawyer at that time asked you this question:

"Q. Were you here when Miss Diamond or Mrs. Mendelbaum testified?

You answered then:

"Yes, sir."

Do you remember answering that way?

A. No, I do not.

Q. Well, I assure you you did.

A. I am not questioning you. If you say I did, probably I did, but I don't remember. I am not questioning you.

Q. You were then asked this question:

"Q. Did you hear her testify that Mr. Swidler was introduced as Mr. Swidler?"

You said:

"I did."

In other words, you admitted that you heard her testify that Swidler was introduced as Mr. Swidler. Now, do you remember saying that two years ago?

A. No, I do not. I don't remember it.

Q. Well, now, you are testifying that nine years ago in 1945 you met and you were introduced to this gentleman by the name of Mr. Levenson? That you do remember; am I right?

(150) A. That is right.

Q. But two years ago you cannot remember your own answer, when you were asked the question:

"Did you hear her testify that Mr. Swidler was introduced as Mr. Swidler," and you say you did, and that you can't remember saying?

A. Not quite, no. It is possible I might have said it, but I just don't remember it.

Q. And then again you were asked the question: "Was Mrs. Mandelbaum correct in her testimony?" and you answered, "To the best of my memory, I say I introduced him as Mr. Levenson, to the best of my memory."

And then you were asked this question:

"Q. She did not so remember"—referring to Peggy Mandelbaum—"and, on the contrary, testified that you introduced Mr. Swidler to her as Mr. Swidler; isn't that correct?"

And you answered, "I heard that testimony."

Don't you remember?

A. There might have been too many—at that particular time the name of Swidler and Levenson were bandied around so much that possibly I might have gotten mixed up on it.

A. Yes. possibly.

(151) A. It is very possible I might have gotten mixed up on it.

Q. Do you know a Mr. Brodsky?

A. Jack Brodsky, yes. He is a jobber down in New York.

Q. Do you know him very well?

A. Fairly well from doing business with him.

Q. How long has he been in the textile business, cotton business?

A. Mr. Brodsky has been in the cotton business for many years, cotton and rayon.

Q. He knows his way around Worth Street, the textile industry, would you say?

A. Well, I would say he knows quite a few people and quite a few people know him. I would say so.

Q. You met Swidler there, didn't you?

A. Yes.

Q. How long did you work at the Kaufmann organization?

A. Roughly, about four months.

Q. Now, this transaction that you had with this lady, Mrs. Mandelbaum, did that occur after the transaction with Kaufmann or before? Did you take care of the Kaufmann interests first when they wanted merchandise back in 1945?

A. It is hard for me to remember.

Q. I beg your pardon?

(152) A. I say it is hard for me to remember. It is such a short period there that I was with Kaufmann's.

Q. Well, you don't remember whether first you supplied or you attempted to supply the needs of the Kaufmann organization and then Peggy Mandelbaum or whether it was vice versa?

A. I couldn't remember that far back.

Q. That you can't tell?

A. It is not quite clear in my mind.

Q. You introduced Mr. Swidler to Mr. Kaufmann, didn't you?

A. Yes, as he came in.

Q. Did you introduce him as Mr. Levenson?

A. I believe I did; I believe I did.

Q. You heard Mr. Kaufmann testify when he was here?

A. Yes.

Q. He since has passed away, I undersetand.

A. So I understood.

Q. You heard Mr. Kaufmann testify in court two years ago, and as a matter of fact, you say you were present when the money was given back?

A. Yes, yes.

Q. Now, do you remember Mr. Kaufmann saying that in his office, Mr. Swidler came in there, that the telephone girl in the waiting office announced that Mr. Swidler was coming in? (153) Do you remember that?

A. No, I don't remember that, no.

Q. Well, I mean that was so ——

A. I might not have ever been in that part of the office. They had a big office there. The telephone girl was outside, I believe.

Q. No, no, no. I am asking you if you remember sitting in the courtroom and you heard Kaufmann testify—page 95, if Your Honor please. Here is the question that was asked Mr. Kaufmann, your former boss:

"Q. Where was Mr. Simon at that time when Mr. Swidler called?"

Mr. Kaufmann answered then:

"A. I don't recall whether he was in the office or whether he wasn't, but the switchboard operator announced that a Mr. Swidler was outside waiting to see me."

Now, don't you remember that?

A. No, I don't. She wouldn't announce it to me.

Q. Maybe I don't make myself clear.

A. Maybe you don't. Maybe I don't quite get it.

Q. You are sitting in the courtroom back there.

A. Yes.

Q. Mr. Kaufmann is on the stand.

(154) A. I thought you were referring to what happened in the office there. You are referring to the testimony of Mr. Kaufmann?

Q. Yes.

A. I don't remember Mr. Kaufmann saying that. He might have said it, but I don't remember.

Q. That doesn't awaken any memory to you?

A. No.

Q. Would you say, if Mr. Kaufmann said that, that from what you know of Mr. Kaufmann, he probably was testifying correctly?

A. Oh, definitely, I believe so.

Q. There is no question about that?

A. There is no question about his integrity, none whatsoever.

Q. And, as a matter of fact, Mr. Kaufmann was asked this question on the same page, page 95:

"Q. Do you recognize Mr. Swidler?

"A. Yes, sir.

"Q. Is this Mr. Swidler sitting alongside of me or next but one to me?

"A. Yes, sir."

And then Mr. Kaufmann was asked this question:

"Q. And you are sure that Mr. Swidler was not accompanied by anyone else?

(155) "A. Yes, sir."

Now, you say that you were in their presence when the refund was made?

A. I was called in, yes.

Q. Yes, but Mr. Kaufmann said that when Mr. Swidler came in he wasn't accompanied by anyone.

A. Well, I never said he was.

Q. Well, were you inside there?

A. I was called into the office.

Q. By whom?

A. I believe by Mr. Kaufmann.

Q. By Mr. Kaufmann?

A. Maybe the telephone operator might have called me to tell me to come into his office. That is a long time back for me to remember those small details.

Q. Well, now, tell me this: Did Mr. Swidler ever give you any money?

A. No, sir.

Q. Did this Peggy Diamond or Mrs. Mandelbaum ever give you any money?

A. No, sir.

Q. Am I correct in saying that Peggy Diamond or Mrs. Mandelbaum did not sell any merchandise to Kaufmann for that particular (156) period?

A. I wouldn't know.

Q. That you wouldn't know?

A. I wouldn't know anything about that.

Q. Do you say you were in the office when Swidler was announced by the telephone operator to go in to see Mr. Kaufmann?

A. I was in the office. I don't know where I was, but I was in the office, yes.

Q. Do you remember Mr. Kaufmann saying this in your presence in this courtroom:

"Q. Was Mr. Simon in the room at that time?

"A. When Mr. Swidler came to the office?

"Q. That is right."

That is the Assistant District Attorney asking the questions, page 105.

Mr. Kaufmann said then:

"A. I don't think so. Had he been, I would have called him into my office.

"Q. As I recall your testimony under cross-examination,

you said that the telephone girl announced that Mr. Swidler and Mr. Simon were there.

"A. Not Mr. Simon.

"Q. Not Mr. Simon?

"A. Mr. Swidler."

(157) Now I ask you, was Mr. Kaufmann correct in that statement then in your presence?

A. I can only tell you what I repeated before, and I remember I believe I was called in by Mr. Kaufmann to witness the returning of the money.

Q. Would you say, therefore, you are not sure; it may be that you were not?

A. I am not sure. I was in there. I was called in when the money was given. That I know because I saw it.

Q. Well, now, let us get back to the first time you met Mr. Swidler. You say you met him in the cafe?

A. I think that is correct.

Q. In New York?

A. That is right.

Q. You had never known or heard of him before?

A. Never.

Q. And you have been in the textile business many years; is that correct?

A. That is right, yes, sir.

Q. Who introduced you to him as Mr. Levenson?

A. I know I met him in the cafe the first time.

Q. You said that.

A. I might have been with Mr. Brodsky or someone else. I (158) don't remember who it was. I believe Harry Meyer was with me, the buyer. That I am sure of. I was in the market with the buyer of Kaufmann's, Harry Meyer.

Q. You are positive, you are absolutely positive, that the man who introduced you to him said, "This is Mr. Levenson"? That you are positive; is that right?

A. I think I am right there.

Q. I mean, that you are positive, but as to who introduced you to him you are not positive—as Mr. Levenson.

A. I said before I thought it might have been Mr. Brodsky. I might have gone in there for lunch or a sandwich or a drink at the bar. I don't remember. It is a long while ago.

Q. Do you remember where the bar was?

A. Yes, right at the corner of White Street and Church.

Q. White Street and Church?

A. The Needle and Thread, that was the name of the bar, at that particular time.

Q. Is that near Mr. Brodsky's place?

A. That is correct.

Q. You testified two years ago, and then you were first asked this question by the District Attorney on page 121:

"Q. What name did he use when he first met you?"

Referring to Mr. Swidler.

(159) You said then:

"A. To be honest with you, I don't remember. It was either one or the other."

Now, that was your first reply. Would you say that that represents a better recollection than today? In your first reply to that first question by the Assistant District Attorney you said, "To be honest with you, I don't remember, It was either one or the other."

Now, what makes you so positive today?

A. I didn't say I was positive today.

Q. I beg your pardon?

A. I didn't say I was positive. You said I was positive just now. I didn't say it; you said it before.

Q. Well, maybe I am wrong. In other words, you are not positive that he was introduced to you as Mr. Levenson—today—I mean nine years ago.

A. It could have been one or the other.

Q. It could have been?

A. It could have been one or the other.

Q. Now, in all fairness, the Assistant District Attorney prodded you and asked you the following question:

"Q. Why don't you remember?"

And you said, "I believe it was Levenson. I won't (160) say sure."

Then you were asked by the Assistant District Attorney, so we have a complete picture:

"Q. Did he use both the names Swidler and Levenson as you knew him in 1945?"

You said then two years ago, "I don't know."

"Q. What did you call him? By what name did you call him?

"A. Levenson, I believe."

That was the way you put it two years ago.

A. I believe that is what it was.

Q. I therefore suggest to you, is it possible that with all the talk we have heard about Levenson and Schwartz and different people talking to you about the case since it started, is it possible that there may be an honest confusion in your mind as of today and you cannot state as a fact to the jury how he was introduced to you at that time?

A. There is a possibility.

MR. LEES: I object, because there has been no testimony about Charles Schwartz.

THE WITNESS: I don't know any Schwartz.

MR. KOSSMAN: I didn't even talk about Schwartz.

THE WITNESS: You just mentioned the name Schwartz.

(161) MR. KOSSMAN: Well, I am sorry.

THE COURT: I will sustain the objection.

MR. KOSSMAN: Did I say Schwartz instead of Levenson?

MR. LEES: You said them both.

MR. KOSSMAN: I will withdraw the question and I will put it this way:

BY MR. KOSSMAN:

Q. With all this talk about this particular case, is it possibe that you today cannot honestly tell the jury—and that is all we want is your honest testimony ——

A. I will give it to you as well as I can.

Q. —whether he was introduced to you as Levenson or whether he was introduced to you as Mr. Swidler?

A. There is a question in my mind now. There is a question in my mind right now.

Q. Well, now, Mr. Simon, goods were very hard to get; is that correct?

A. Quite right.

Q. We had to have priorities; is that correct?

A. I believe so.

Q. Is Kaufmann's Department Store one of the largest organizations of its kind in the country?

(162) A. It is one of them.

Q. A couple of hundred millions dollars a year business?

A. Oh, yes.

Q. They had trouble getting it; is that right?

Q. Quite right.

Q. You needed a priority to get the goods; is that right?

A. I don't think the department stores bought on priority.

Q. They didn't have the priority, but you needed the priority?

A. People that had merchandise needed priorities to get them, yes.

MR. KOSSMAN: That is all.

RE-DIRECT EXAMINATION.

BY MR. LEES:

Q. Mr. Simon, the first question that you were asked on cross-examination was, did you read your testimony at the last trial to refresh your recollection.

A. At the last trial?

Q. The last trial, and your answer was that you did.

A. No, I did not.

Q. I show you the notes of testimony of the last trial. Did you read these?

A. At the last trial, no, sir. Nobody showed me anything.

(163) Q. You read this (indicating), didn't you?

A. Yes, I did.

Q. It is a statement that you gave to Special Agent Shipley.

A. I believe that was it, yes.

Q. And that was given when?

A. I don't remember the date.

Q. Sometime before the last trial, wasn't it?

A. Yes, yes, yes.

Q. If I were to tell you ——

MR. KOSSMAN: Just a moment. I am not so sure you can tell him.

MR. LEES: I haven't finished the question.

MR. KOSSMAN: All right.

BY MR. LEES:

Q. Is this your signature, sir?

A. Yes.

Q. Will you read the date that appears next to your signature?

A. The 6th day of January, 1949.

Q. Is that when you were first interrogated, you gave a statement to Mr. Shipley?

A. Yes.

Q. Was your recollection better in 1949 or in 1954?

(164) A. Of what went on in this case?

A. Yes.

A. I guess in 1949.

Q. Have you given us your honest recollection here today?

A. I definitely did.

Q. Did you testify your honest recollection in 1952?

A. Definitely, honestly.

BY THE COURT:

Q. What is your honest recollection as to how you introduced the defendant here to Miss Diamond, Mrs. Mandelbaum? What is your recollection as to what name you introduced the defendant by to Miss Diamond, as she was known in the trade?

A. I am somewhat confused, Your Honor.

Q. I know you are.

A. I am confused.

Q. What is your recollection?

A. I thought I introduced him—Mr. Levenson—as Mr. Levenson.

Q. Do you remember the court taking you to task about not guessing two years ago?

A. Yes, sir.

Q. Do you remember me saying to you, "Let us get straight talk here"?

(165) A. Yes, sir.

Q. I asked you, "You introduced the defendant in this case, David Swidler, to Miss Diamond as Levenson?" and your answer was "Yes, sir."

A. Yes, sir.

Q. You said that two years ago?

A. Yes, sir, I remember that.

Q. All right. Now, are you confused? All that any witness can give Mr. Kossman is his best recollection, and certainly we don't want to have any defendant in this court hurt. We just want your best recollection as to the name under which you first knew this defendant.

A. As I said before, Your Honor, I am confused now, definitely confused.

Q. You are confused now?

A. My recollection two years ago probably was better than today, and if I said Swidler then, maybe it was Swidler, but I am confused.

Q. You are confused now? You didn't read your testimony before you went on the stand today? You didn't read these notes of testimony?

A. Oh, no.

Q. It wasn't furnished to you by the United States Attorney (166) so that you could refresh your recollection?

A. No, sir.

THE COURT All right, that is all.

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(247) P. DIAMENT.

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. You talked to the agent this morning, Mr. Shipley, before you testified?

A. Did I talk to him?

Q. That man there sitting in the center.

A. Yes, I said hello to him. As a matter of fact, I didn't recognize him.

Q. Did he go over your testimony with you, what you said last time?

A. He showed me papers. I didn't read it, no.

Q. Did he ask you to change anything that you said last time?

(248) A. No, not to my knowledge.

Q. Then why do you come in this morning in court and when the assistant district attorney asked you what name Mr. Swidler was introduced to you, you said Levenson?

A. That is right.

Q. Well, now, I refer to page 111, two years ago. Your memory was better two years ago, wasn't it?

A. Right.

Q. You were asked this question by the assistant district attorney two years ago:

"Q. Was he introduced to you by the name of Mr. Swidler or what?

"A. By the name of Mr. Swidler, right."

That is what you said two years ago. Why did you change it today?

A. It is quite possible that I had forgotten at the time, and I remembered meeting Mr. Swidler in my showroom, and introduced to me by Mr. Simon, and when I tried to get him on the phone to come down to the factory, I said, "Tell me, what is your right name? What is your name? Isn't it Levenson?"

He said, "No, Swidler."

When I went up to Kaufmann's to try to find him ——

Q. Please, please, please. Last time you stated in answer to the question—very simple—the assistant district attorney asked you, what name was he introduced to you by, by the name of (249) Swidler or what? You answered then, "By the name of Mr. Swidler, right." That is what you answered last time. Was that right or was that wrong?

A. No, then I made a mistake.

Q. Well, when did you make the mistake? Today after talking to the agent or two years ago?

A. No, I don't remember what I had answered, but I know, if my memory failed me then, it is a little more keen about what has happened, because I suppose I have got to remember every detail that I possibly can. If I remember correctly, I think he was introduced to me as Mr. Levenson.

Q. That is what you say today.

A. I believe so, right.

Q. I mean, you say that today.

A. Yes.

Q. But two years ago you said he was introduced to you by the name of Swidler.

A. Then I knew him as Mr. Swidler and probably forgot that he was introduced to me as Mr. Levenson. I had no ulterior motive in my mind.

Q. I can only put it to you this way: Do you prefer me calling you Mrs. Mandelbaum or Mrs. Diament?

A. Diament.

Q. You were aksed this question two years ago by the (250) assistant district attorney:

"Q. Was he introduced to you by the name of Mr. Swidler or what?"

You answered then, "By the name of Mr. Swidler, right."

That is what you said. Then you talked later on about Mr. Swidler came in the following day, and so forth. Now, today you come into court, and after you spoke to the agent this morning, and when the assistant district attorney asked you what name was he introduced to you by, you said Mr. Levenson.

A. Yes.

Q. That is two years later?

A. Yes.

Q. Now I am asking you, was it suggested to you by the Internal Revenue agent? Did he mention the word Levenson this morning to you?

A. No. I happened to glance at the paper, but that still wouldn't make any difference because I didn't remember whether he was introduced to me as Levenson or Swidler. If I remember correctly, he was introduced to me as Mr. Levenson, and I got to know him as Mr. Swidler after I tried to locate him and couldn't.

Q. But two years ago when you testified—and I won't ask (251) you this any more—you said that he was introduced to you by the name of Mr. Swidler. There is no doubt in your mind that is what you said then?

A. Yes, what the statement is in there I probably did.

Q. Have you talked to Mr. Simon about this case?

A. Since when?

Q. Any time.

A. You mean up to the time that this started two years ago?

Q. Any time.

A. You mean the case that is going on now?

Q. Yes.

A. No, sir.

Q. Well, did you talk to him when the case first came up?

A. You mean after we came to Philadelphia? I haven't seen Mr. Simon.

Q. Two years ago.

A. Within the two years? No.

Q. Wasn't Mr. Simon in court when you testified last time?

A. Yes, but I did not speak to him.

Q. You testified that when you called the Levenson number you didn't get an answer; is that right?

A. Right.

Q. You weren't told that there was no number?

A. I don't remember that, whatever it was. I know I didn't (252) get an answer.

Q. This girl from Kaufmann, is that how you indirectly met Mr. Swidler?

A. I met Mr. Swidler through Mr. Simon, who at that time was the piece goods buyer for Kaufmann's.

Q. You did some business with Kaufmann.

A. Yes, we sold ——

Q. Were you in the room when Mr. Kaufmann was testifying last time two years ago?

A. I don't think I was in the room at the time. I don't believe I was in the room at the time.

Q. Did you ever ask Mr. Swidler whether he was Mr. Levenson?

A. I don't remember. I really don't.

Q. Was it your impression that Mr. Swidler had the merchandise and was in control or that he was getting it through some other source?

A. No.

MR. LEES: I object. We are not interested in impressions.

THE COURT: I will let her answer if she is able to.

THE WITNESS: No, I was just doing business with this gentleman. I knew of nobody else. I was just doing business with Mr. Swidler. I didn't know of anybody else.

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(490) DANIEL K. SHIPLEY, resumed.

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. Mr. Shipley, do you have any extra or special interest in this case that would prevent you from giving the full story

that would be just as favorable to the defendant as to the Government?

A. I don't quite get the question. I think I understand what you mean, but would you read the question, please?

(The last question was read by the reporter.)

A. I have no special interest in the case.

Q. You testified in court two years ago, didn't you?

A. Yes, sir.

Q. This testimony that you related today concerning your interview with Mr. Swidler, do you consider that important in this case?

A. Well, it was a question asked me. I had to answer.

Q. I am asking you, do you consider that testimony important?

(491) A. I am not the judge. I don't know what is important.

Q. Well, did you testify two years ago in court concerning this interview as you have today?

A. No, sir, I was never asked.

Q. You are the investigator. You sat beside the District Attorney last time, didn't you, two years ago?

A. I can't sit beside him when I am on the stand and tell him what to ask me.

Q. Did you tell the District Attorney to ask you questions about the interview?

A. This time or the last time?

Q. Last time.

A. I did not. He had access to my complete report in the case and he didn't ask me. This man did.

Q. He didn't ask you and this man did ask you?

A. Yes, sir.

Q. Was there any discussion between you and the Assistant District Attorney two years ago as to why he didn't ask you these questions?

A. No, sir.

Q. Were you surprised that he didn't ask you two years ago?

A. Yes, sir.

Q. You were on the stand several hours. You made no attempt (492) to have the Assistant District Attorney ask you these questions?

A. No, sir.

Q. About the interview?

A. No, sir.

Q. All right. Now we will come to the interview. Am I correct in saying he attended this interview without a lawyer and voluntarily?

A. Without a lawyer what?

Q. And voluntarily. I am referring to the one in the Ayer Building when he came down to see you.

A. Not voluntarily. I had discussed it with him.

Q. Let us put it this way: Did you issue a subpoena?

A. Oh, no, he wasn't subpoenaed.

Q. Did he come down voluntarily?

A. When you say "voluntarily", I accept that he initiated the coming down. He did not initiate the coming down. He came down without force.

Q. He came down at your request?

A. Yes, sir.

Q. Without any process being served upon him?

A. Yes, sir, he did.

Q. You told him then, referring to Question 3—by the way, there are about 250 questions—you told him then,

(493) "Although I feel that you are aware of your constitutional rights, I should advise you that you are not compelled to answer any questions. If you do answer and the answers incriminate you, the Government may or may not use those answers against you in any civil or criminal proceedings that they may decide. Did you understand that?"

He said,

"Yes."

So you told him about that?

A. Yes, sir.

Q. And he proceeded, after you said that, to answer I think 250 questions; is that correct?

A. Yes, sir.

Q. By the way, did you read this report since you got off the stand, in between?

MR. LEES: Don't answer that.

MR. KOSSMAN: Why not?

MR. LEES: I want to talk to the Judge.
May I speak to Your Honor, sir?

THE COURT: He can answer that yes or no.

MR. KOSSMAN:

Q. Did you or did you not?

(494) MR. LEES: I would rather speak to Your Honor first, if I could.

MR. KOSSMAN: I will withdraw the question.

MR. LEES: No.

MR. KOSSMAN: I will withdraw the question. Are you going to tell me I can't withdraw the question?

THE COURT: I see no harm in answering the question yes or no, Mr. Lees. I can see no possible harm in his answering yes or no, because I can see absolutely nothing improper if he did read it.

THE WITNESS: What is the question?

MR. KOSSMAN: I will withdraw the question.

BY MR. KOSSMAN:

Q. You asked Swidler at that time where he lived; is that correct?

A. Yes, sir.

Q. By the way, this was in 1949, January 12, 1949?

A. Yes, sir.

Q. And he told you, that is, referring to 1945, that for two years previous to that he had been living with his in-laws at 33rd and Clifford Streets? Do you remember him saying that?

A. Yes, sir, I do.

Q. You asked him what education he had. He told you he was a (495) pharmacist—grammar school, high school, and a pharmacist; is that correct?

A. Yes, sir.

Q. Graduated 1926, and you asked him then if he had filed income tax returns throughout the years, and he told you he did; was that correct?

A. He told me he did when it was required, something about when it was required.

Q. His exact answer was,

"Every year where it was necessary."

A. Yes, something like that, that is right.

Q. You asked him if he prepared his own return, and he told you he never prepared his own return. Do you remember him saying that?

A. I recall he said somebody up around City Hall, or something like that, had prepared his returns for him.

Q. Well, he said a Mr. Cogan at the National Bank Building. That was his answer. The National Bank Building is around City Hall, but he didn't say someone around City Hall.

A. I knew that the building that he referred to was near City Hall.

Q. There is a different inference.

A. I intended no inference, counselor.

(496) Q. You showed him his income tax return for the year 1944 and he identified it; is that right?

A. Yes, sir.

Q. You showed him his income tax return for the year 1945 and he identified it, then you showed him the various partnership returns and he identified his signature; is that correct?

A. Yes, sir.

Q. Now, I notice there are some pencil marks here. Are these pencil marks made by you?

A. Yes, sir.

Q. You testified on direct examination this morning that when you came to visit him he gave you all the records; is that right?

A. He gave me all he had. That was all he had. He told me that was all he had.

Q. You will forgive me if I skip around on some of these questions. You testified today—the Assistant District Attorney asked you this question—now listen very carefully:

"Q. Did you ask him about Samuel Cohen?"

Your answer this morning:

"A. Yes, I did. I asked him if he ever had any business transactions with Samuel Cohen, because there was a loan appeared on the Mothercraft books of $7500 to Cohen, and he said that he had loaned him some money (497) and that it had been repaid within about three weeks, and as I inquired the occasion of the loan and the detail of the loan, he told me that was none of my business, all I should be concerned about was the loan was paid off in the books, what it was for or why it was done was none of my business."

That is what you said this morning.

Now, I suggest to you, in all fairness, that this was the question you asked him and this was his answer five years ago:

"Q. Now, in checking your accounts and shipments, and so forth, we ran across the Bridgeport Luggage Company. Did you have any business transactions, other than a loan, with the Bridgeport Luggage Company?"

That was the question that you asked Mr. Swidler when he was sitting in your office. Do you remember asking him that?

A. Yes.

Q. Now, you have testified how he answered. Now I have the original record. This was his answer then to that question:

"A. No. I have had—Mr. Cohen's a friend of mine and he called me one day and was short of some money and asked for a loan—I think it was $7500—which he paid back a few weeks or a month later."

(498) Is there anything there about it is none of your damned business?

A. No, sir, nothing there in that statement.

Q. I beg your pardon?

A. There is nothing in that statement there about that.

Q. Is there anything in any statement here?

A. Not in your notes.

Q. Weren't you referring to the ——

A. No, you are confused, counselor. That statement in your hand was made on January 12, 1949.

Q. Yes.

A. The time that the taxpayer told me that it was none of my business about the loan was on April 2, 1948, in his offices.

Q. Well, I refer you to today's testimony that you started, and you were asked, "Did you talk to him on another occasion?"

"A. I did.

"Q. When was that?

"A. On January 12, 1949."

You talked to him once in April, 1948, and then ten months later?

A. Yes.

Q. Now, you talked about after you completed a field examination you sent out a letter to the taxpayer giving him an (499) interview, a time to come in, and in pursuance of that procedure Swidler was invited in the office, and on that occasion this discussion follows.

A. If it is, there is somebody mixed up, because I have a record of the interview that I had with him wherein he said that, and it was on April 2, not January 12. If you read from that record you have there, the question was asked me about the two days of interview, April 2 and January 12, and then those questions follow. There doesn't seem to be any distinguishment there as to particularly which time that particular interview took place.

Q. Well, but I suggest that you did ask Mr. Swidler about this loan for 1949.

A. On both occasions I believe I asked him.

Q. Oh, on both occasions?

A. On both occasions I asked him.

Q. But on one occasion you now say—do you have a stenographic report of the first one?

A. I have it in my own handwriting that I wrote immediately after it took place.

Q. Do you have a stenographic report of the conversation you had with Mr. Swidler at the first time?

A. Not a stenographic report. I have contemporaneous memoranda (500) on it, though.

Q. There was a previous question by the Assistant District Attorney:

"Q. I take it at this stage of the game when you talked to him you had learned a great deal about the taxpayer; is that right?"

Your answer was,

"Oh, yes."

Now, is it your contention that when he asked you about Samuel Cohen, you were now talking about what he said in 1948, you weren't referring to 1949, and that is the reason

you said he told you there it was none of my business, but it is not in here; is that your contention?

A. I don't understand the question, counselor.

Q. I will withdraw the question, then.

Now, do you remember you asked him about the suppliers?

A. Do I recall the question that I asked him about suppliers?

Q. By the way, how many pages, so that I can guide myself in the future, is that original thing? Is it as many as this or is it relatively smaller, if you remember?

A. What original thing? What do you mean by the original thing?

(501) Q. The original memorandum that you made.

A. The one that I made in my own handwriting?

Q. Yes, the one that you made in your own handwriting.

A. As I recall, it is about, oh, possibly three pages of handwriting.

Q. You never typed them up?

A. Yes, sir, it was typed up.

MR. LEES: It is the paper I offered to you that you said wasn't worth the paper it was written on, and you objected when I handed it to you.

MR. KOSSMAN: Well, I am going to ask the Assistant District Attorney to take the stand and testify.

You know why I told you it wasn't worth the paper it was written on.

MR. LEES: No, I didn't.

THE COURT: Gentlemen, we have had all that we are going to have of this repartee in this trial. It stops now.

MR. KOSSMAN: I am sorry, Your Honor.

BY MR. KOSSMAN:

Q. Now, do you remember you testified this morning that you asked him if he ever sold any merchandise to Einhorn Brothers and he said no?

A. Yes, sir.

(502) Q. That is what you said, no question about that? You said it this morning.

A. Yes.

Q. Do you want to change your answer?

A. No. I might like to amplify it.

Q. Here was the question that you asked him in 1949. You asked him then:

"Q. Did you ever deliver the invoices to Einhorn's for merchandise sold in the name of Mr. Levenson or Mr. Schwartz?"

He answered then,

"I may have. I have often been over there to view merchandise that he had for sale and I may have turned over an invoice to him for goods."

Do you remember him testifying that way?

A. Yes, sir.

Q. He did testify that?

A. Yes, sir.

Q. Do you remember you asked him then, back in 1949:

"Q. Did you ever receive the checks in payment of this merchandise sold to Mr. Einhorn by Levenson or Schwartz?"

Do you remember what he answered then?

(503) A. I think he answered that he may have picked them up and passed them on, on a couple of occasions, and I think he cites that there was some trouble with some outfit in New York or something that he acted as intermediary in returning a check or something.

Q. He did state as follows:

"A. I think on a couple of occasions he did give me the check to turn over to Mr. Levenson. I think he told me he had sent a check to New York and had it returned * * *."

That is referring to your trouble there, I guess, in New York.

Now, you asked him this question:

"Q. Any of these checks that you received from Mr. Einhorn in payment of merchandise invoiced to him from J. Levenson or Charles Schwartz—did you ever cash any of those checks yourself?"

Do you remember that?

A. Yes, sir.

Q. And he answered at that time:

"Personally, no."

A. It could be.

Q. I assure you I am reading correctly from here.

(504) Now, you asked him this question:

"Q. Did you ever receive any monies from any person cashing checks in the name of Charles Schwartz or J. Levenson?"

Do you remember what he told you then?

A. I think he said that he didn't receive any monies.

Q. Absolutely not.

Did you ask him at that time whether he ever represented himself to be Schwartz or Levenson?

A. I think I did ask him that question.

Q. How did he answer it?

A. I think that he said that he never misrepresented himself that way, but that he had been in the company of Levenson, and some people may have made a misinterpretation, or words to that effect.

Q. All right, now, in answer to the question,

"Have you yourself ever used the name J. Levenson or Charles Schwartz in any of your business transactions? Did you ever represent yourself to be Charles Schwartz or J. Levenson?"

Mr. Swidler replied:

"No, I did not."

That was his answer.

(505) A. Well, isn't there more to it than just that?

Q. Well, I will show it to you.

Now, this morning you were asked:

"Q. Did you ask him if he ever used the name Levenson or Schwartz?"

Probably that is why it is in your mind.

"A. I did. He said no, but that he may have been mistaken for one of them because he had been with Levenson."

You see, you said today that that is the way he answered at that time.

A. Well, I think, counselor, some place in that statement you have in your hand there is an answer like that.

Q. It may be, it may be. I just got this an hour ago.

Now, you did say to him this morning, you were asked this question:

"Did he say anything about Bill Stein?"

Your answer was:

"I don't believe I mentioned the name Bill Stein to him."

That was your answer this morning.

Bill Stein, of course, is Steintex; is that correct?

(506) A. Yes, sir. I did ask him about Steintex.

Q. You asked him last time:

"Q. Can you name some of the companies that you interceded for the jobbers in making the piece goods purchases?"

You asked him for names. He said:

"Steintex Fabric."

Do you remember him saying that?

A. He answered, I think, three firms. Firms, not individuals, counselors. You asked me about William Stein. Now you are asking me about the corporation, or Steintex. I take that as a different question.

Q. He answered:

"Steintex Fabrics, Fairmount Fabrics, J. Levinson;" is that correct?

A. I believe that is correct.

Q. Isn't it a fact that when you looked over his books of

account you found he purchased from J. Levenson and Charles Schwartz?

A. Yes, sir, there were invoices from Charles Schwartz and J. Levenson.

Q. More particularly in reference to that check, when he signed the check as a maker instead of ——

(507) By the way, there were thousands of checks; am I right?

A. There were quite a few.

Q. I see this number is 2736.

A. There were a volume of them.

Q. Now, this check that has been introduced into evidence where he signed the name Charles Schwartz ——

MR. LEES: Whom are you talking about when you say "he"? Keep the record straight.

Q. Mr. Swidler signed the name of Charles Schwartz instead of his own name for Mothercraft and it cleared through the bank. You saw that at that time; am I right?

A. Yes, sir.

Q. Did you see the invoice at that time for that particular thing and does it correspond to the check?

A. This is No. 4115. I know the voucher section of the check said 4125. It was a little different, but I think that is the same one. I think that is for that invoice.

Q. Isn't it for the same amount of money?

A. Yes, but this would throw you off, because the number over here on the voucher section is 25 instead of 15, but it is the same amount, certainly the same amount.

Q. Well, look over here. Doesn't it say "Invoice" on top, (508) 4125?

A. Oh, yes.

Q. Was there any special reason why, when you testified this morning, you didn't use these notes but you trusted to your memory?

A. Why, the District Attorney had them.

Q. I beg pardon?

A. The District Attorney had them. You mean that statement that Mr. Swidler made?

Q. Yes.

A. Well, the District Attorney had them.

Q. Now, do you remember you asked Mr. Swidler why did he go around on these different transactions, or whatever they were, why did he do it, why did he go to these people and do this thing? Do you remember asking him that?

A. I don't recall that question, counselor.

Q. Didn't you ask this question of Mr. Swidler back in 1949?

"Q. Did you ever sell any goods for Levenson yourself or were you concerned in any sale with Levenson?"

He answered then:

"Yes."

Am I right?

A. I believe that is correct.

(509) Q. He said:

"I am a member of the Philadelphia Waist and Dress Manufacturing Association, and we would sometimes sell sell or trade, or refer him to somebody, if anyone was interested, and in that way, if he made a sale, he would usually reduce our price to us."

Do you remember that?

A. Yes, sir, I remember that answer.

Q. Do you remember you asked him:

"Q. He wouldn't give you any direct commission?"

And he said:

"No. I have never received any monies for the company nor for myself other than a lower price."

Do you remember that?

A. I remember him saying that, yes, sir.

Q. Now, you saw the bills, didn't you? You saw the invoices from Charles Schwartz and Levenson there, didn't you?

A. Yes, sir.

Q. Do you remember what the price was that Schwartz billed this merchandise to Swidler, Mothercraft?

A. Offhand, I don't without seeing it. I wouldn't recall.

Q. Well, would you say it was less than the price that was charged to Diana Stores, Kaufmann, Einhorn, Bader-Diamond, and (510) the others?

A. I can't recall, but I would assume it would be less.

Q. Well, suppose I suggest to you that the price was 30 cents.

A. Well, let me see an invoice and maybe I can recognize it.

Q. All right, as of January (handing).

A. Yes, they are billed at 30 cents a yard.

Q. Another one (indicating) at 40 cents; am I right?

A. Yes, sir, that is what this says.

Q. Do you think I made these things up today or were they present when you picked them up?

A. No, from this writing, which I seem to recognize, I think they were there when I looked at them in 1948.

Q. And without going through all these things, am I correct in saying the general price range of goods sold to Mothercraft ran into 30 cents and 40 cents, just above the mill price at that time?

A. Well, those two that you showed me, and I don't recall the others. I think there was some variance that some of it was higher than that, as I remember.

Q. Yes, there is 45 cents, there is 32½ cents, but it wasn't a dollar a yard, was it?

A. Oh, no.

Q. This is Question 225:

(511) "Q. When you took an order for goods, did you give an invoice?"

I will tell you what his answer was then, to save time:

"A. Well, I wasn't a salesman. I would just perhaps see what the other fellow had, and if he had something I could use or I had something he could use, it would be either a

trade or a difference in payment made. We were doing quite a bit of trading in goods at that time—all of us."

Now, the next question you asked was this:

"Q. Just take an instance:

"Say you had a swatch of goods you were showing, and the material, as you say, was for this fellow Levinson or Schwartz, and you say you took a few orders for him. When you took that order did you give an invoice for the merchandise that was ordered or have anything to do with it beside taking the order?"

Do you remember his answer then?

A. No, sir, I don't recall his answer.

Q. Well, he answered then, Mr. Swidler said, referring to Levenson or Schwartz:

"A. He always issued an invoice for goods pur- (512) chased from him or I wouldn't have bothered with it. It was strictly ——"

Now, you asked this question:

"Q. Did you ever present the invoice to the purchaser?"

Do you remember his answer then?

A. No, sir, I don't recall.

Q. Well, he said:

"I may have on some occasions."

Did you ask him then if he received the checks for the merchandise on that invoice, do you remember?

A. I think I did ask that question.

Q. What did he say?

A. I think that he said that he may have on some occasions and passed it on to Mr. Levenson or Schwartz.

Q. Was that the impression that you gave this morning or did you give the impression to the jury that he never got any of the checks?

MR. LEES: Well, I think I will object to the impressions.

THE COURT: Sustained.

BY MR. KOSSMAN:

Q. Now, did you ask him this question, whether he cashed the (513) checks and got the cash money?

A. I think I did ask him.

Q. And he said:

"Personally, I did not."

I went over that before.

Now, you asked him this question:

"Q. Did you ever accompany anyone cashing those checks?"

Do you remember what he answered then?

A. I think he answered no, but I am not certain.

Q. He answered:

"Again I feel I would—it would tend to implicate me to answer that question."

You asked him:

"How?"

I am going back to 1949.

He said:

"Because I have never received any profit from this other than getting a lower price for the goods purchased from Levinson, and I don't feel as though I should involve myself in this thing."

You then said to him this:

"Q. If you didn't receive any income I agree (514) with you that you are not involved in it. Just accompanying a man getting a check cashed doesn't give you an income. I can't see how it involves you as an income tax liability."

That was your statement.

To save you time I will read the answer rather than ask you if you recall.

"A. Neither do I, but I don't know the law. But I'm not represented by an attorney here. I came of my own free will to answer the questions put before me and I'm answering to the best of my ability and I'm trying to cooperate in

every way except where a question would tend to implicate me."

Do you remember his answer?

A. No, it is quite an involved answer.

Q. You will admit that I am reading ——

MR. LEES: I am going to object, sir.

I think that there is no reason to get the statement in this way.

THE COURT: I will overrule the objection.

MR. LEES: Very well, sir.

THE COURT: Proceed.

BY MR. KOSSMAN:

(515) Q. Now, you asked him this question, and to save time, rather than ask if you remember it, I am going to read his answer. Here was the question. You asked him then:

"Q. Suppose I ask a few simple questions which might settle that issue. Any of these checks that you received from purchasers of merchandise, which checks were made payable to Charles Schwartz or J. Levinson—did you receive any income from these checks?"

He answered then,

"I absolutely did not. Every one was turned over to Levinson.

"Q. Did Levinson pay you anything for this service, or Schwartz?

"A. The only thing that was received was by Mothercraft, and that was a lowering in price on the merchandise.

"Q. How much?

"A. Which you could readily see yourselves if you checked prices against the prices I paid. If the other party

would pay sixty cents for a yard, I was charged fifty cents for a yard * * *."

Q. Question 236:

"Well, just take your example: When yard (516) goods, we'll say, was sixty cents a yard, and you got that same goods for fifty cents a yard, which I believe you just explained ——

"A. Yes.

"Q. —how would you carry that on your books? Would you carry that as fifty cents a yard and ten cents discount, or would you carry it as fifty cents as the cost?

"A. No. I was billed at the lower prices.

"Q. Then the market price didn't enter into the transaction as far as your books were concerned?

"A. That's true."

You put it this way. Listen carefully.

"Q. Well, actually weren't you getting, as you say, sixty-cent goods at fifty cents in exchange for your services or help or assistance? You might say you were actually getting ten cents a yard ——"

Do you remember saying that to him?

A. I may have.

Q. Well, is it your conception under the income tax laws—you are an investigator—that a transaction like that results in tax liability?

A. Well, my reason for asking questions as an income tax (517) investigator is to determine the true facts. If he is not liable for the income and the income is going to somebody else, or there is a commission income, I try to make a factual determination so that his liability can be established and the other fellow's as well.

Q. Do you remember you said this to him, in the form of a question, No. 239:

"Q. I want you to give me every bit of information, Mr. Swidler, for this reason. This will be your last and only opportunity to make any explanation you wish to the Government of the circumstances surrounding your income tax

liability. When we finish this interview today, you will have no subsequent opportunity, as far as I'm concerned, to express costs or circumstances that you were involved in which may require an explanation. If you have any explanation to make concerning your income tax liability, this is the time and place to make it."

Is that correct?

A. I did tell him that.

Q. Is that a correct statement under the law and the regulations, that this is his last time and opportunity to make any explanation he wishes to the Government of the circumstances.

A. When that statement is included in the report, the report (518) is written, and when it leaves the office, I have no further—it goes forward from our office for processing, and once a report is written I have no further connection with the case. I couldn't give another interview or make an explanation. It would be some place up along the line. As far as I am concerned, that would be the last opportunity, and that is exactly what I said.

Q. But it certainly is not correct to say to an individual—and nobody knows it better than you—that this was his last and only opportunity to make any explanation to the Government.

A. I didn't say that. Read the whole thing, counselor. It changes the interpretation of the question.

Q. This man was sitting there without a lawyer; is that right?

A. At that time?

Q. Yes.

A. Yes, sir.

Q. You said, "I want you to give me every bit of information, Mr. Swidler, for this reason. This will be your last and only opportunity to make any explanation you wish to the Government of the circumstances surrounding your income tax liability. When we finish this interview today, you will have no subsequent opportunity, as far as I am con-

cerned, to express costs or circumstances that you were involved in which may require an (519) explanation. If you have any explanation to make concerning your income tax liability, this is the time and place to make it."

Now, is it your interpretation of this statement that you were only referring to yourself?

A. That is right. I say that; I say that.

Q. Do you think that the taxpayer sitting there could be left under the impression that he couldn't give an explanation to anybody else after you finished? Is that possible?

MR. LEES: I object.

A. Counselor, I don't know what his process of thinking would be.

BY MR. KOSSMAN:

Q. Do you remember at that time the defendant was worried about OPA?

A. Was worried?

Q. Was concerned in OPA prices? Weren't there two agents who came in to see him back in 1946 and 1947 about an OPA price?

A. I don't know. He can tell you. I didn't have anything to do with it.

Q. Were there ever OPA agents concerned in this case?

A. In this case?

Q. Back in 1946, in December. Not this case.

A. I don't know, counselor.

(520) Q. What is that?

A. I do not know of my own knowledge.

Q. Well, didn't you hear the accountant?

A. Yes, sir.

Q. In your presence?

A. He said, "I don't know." He said that.

Q. I said to the accountant in your presence, while you were sitting here,

"When two agents came around from the Currency, Price Stabilization, or some name like that, did you discuss it later on?"

You heard the accountant say,

"Yes, Mr. Shipley told me they were OPA agents."

A. May I explain that to you, counselor?

Q. You can explain anything.

A. When he made his statement to me concerning his preparation of the returns and he gave me that title that these men were Currency Protection Branch, or something or other, I knew that he was in error, that there was no such branch of the Government, to my knowledge, and when he told me what they were inquiring about, I told him it was OPA.

Q. Well, now, when you were speaking to the accountant —Mr. Swidler referred you to his accountant, didn't he, Sol Lavin?

(521) A. (No answer.)

Q. Well, you met the accountant, Sol Lavin?

A. Oh, yes.

Q. You asked the accountant this question about why he didn't sign a certain tax return. Do you remember his answer then to you? He said there,

"I have a note in my paper dated March 7 which refers to a meeting with Mr. Toplan and Mr. Somers, special agents."

So you did know at that time something about OPA?

A. Oh, something about OPA. That is a rather vague question, counselor.

Q. But, as a matter of fact, you didn't even say anything about OPA when you were interviewing him at this interview?

A. What do you mean, I would say anything about OPA?

Q. Did you mention the word OPA? Were you trying to lull him into a feeling that this was no OPA investigation,

he shouldn't be afraid of some transaction over ceiling price during this thing? Do you remember?

A. The questions I asked speak for themselves. You have them right there, and I recall no questions like that. To lull this man, you mean, that it was of no consequence to him? I (522) told him it was an income tax investigation.

Q. I am asking, did you try to tell him that it wasn't an OPA case?

A. I don't know what you are driving at.

MR. LEES: Neither do I, sir. I will object to the question.

THE WITNESS: I told him that this was an examination of his income tax liability. I state that in the fore part of the statement.

BY MR. KOSSMAN:

Q. Did you tell him that this was not an investigation of OPA prices, so he should not be afraid to tell you about a transaction?

A. I may have said that in explanation, yes, sir.

Q. Well ——

A. I don't recall stating it in the way you say, counselor, but I may have done that to show him that I was not concerned in price violations but I was concerned in tax matters.

Q. Now, here is the exact question you asked him.

"Q. Again, let me try to put the idea over to you what this is. This is not an investigation of OPA prices. This has strictly to do with your income tax liability."

(523) Do you remember saying that?

A. That would be very much like ——

Q. Why did you tell him that, if the question wasn't raised that he was worried about OPA? You didn't tell him this was not an investigation of narcotic laws or an in-

vestigation of Federal housing. Why would you tell him this is not an investigation of OPA prices, unless he was worried about OPA ceilings at that time. That is my question.

A. You asked me—would you read that question, please?

MR. KOSSMAN: I will withdraw that.

THE COURT: I suggest you do. If there had been an objection, it would have been sustained promptly.

Suppose we ask questions instead of making statements with conclusions and then ending up in a fifth question. Let us keep our questions straight, Mr. Kossman. That was a very involved question containing four facts. The Court can't follow it quite that fast. I like to follow questions.

MR. KOSSMAN: The Court appreciates that I just received this book.

THE COURT: I appreciate there is always difficulty and pressure in working in the trial of any case, and I try to make due allowance for it.

(524) MR. LEES: I would like to make it clear, sir, that the defendant was able to get one of these things in 1948. We made our copy available at 12:30 at the recess, and he had it from then till 1:25, when I took the first 22 pages back. We are not trying to take any undue advantages of anybody, Mr. Kossman.

THE COURT: Let us get along.

BY MR. KOSSMAN:

Q. Do you remember asking this question:

"Q. Mr. Kaufmann has made a statement regarding the fact that he was reimbursed for that returned merchandise, and has stated the circumstances, and I'm asking you what

you had to do with that return of merchandise or the reimbursement to Mr. Kaufmann?"

He answered as follows:

"A. Well, Mr. Shipley, I think that really was a point at law and I think it would unnecessarily tend to implicate me in this deal."

You asked him this question:

"Q. How? I mean, if you are just an agent for somebody else or performed a service for somebody else, how would that involve you?"

And Mr. Swidler answered as follows:

(525) "A. It happens that it would. It may, rather. It may involve me and I don't care to involve myself in it because I received no remuneration or profit from it, and for me to make a statement like that, I feel that I would, as I said before—it would tend to involve or implicate me in this deal of which I have nothing other than grief of."

You then asked him this question:

"Q. Well, you may construe certain facts that way, but if, as you have told me, you have no involvement in the thing, received no income from it, then I think you are under a misapprehension."

And he answered as follows:

"A. I don't understand that end of the law and I'd rather not answer that question for that reason."

You said to him:

"Q. Well, you mean, because you don't understand the law?"

And he said:

"A. That's true."

Now, you then said to him this:

"Q. That's not a sufficient reason to refuse to answer a question—understanding a law. If you have (526) had any dealings with Mr. Kaufmann's office, I would like to have that information. Now if, as I say, you were acting as an agent for someone and received no income yourself, then I

see no way of you being involved in it. But I want the facts of whose income it was."

Didn't he tell you that it was Mr. Levenson's income?

A. I don't recall that as the answer.

Q. He answered as follows:

"A. Mr. Levenson's income, evidently."

I am only doing it this way to save time.

A. Thank you, counselor.

Q. There are just a few more questions. Do you remember the question:

"Q. You stated that in your opinion you felt that you might incriminate yourself. I have asked you if you make that statement as a result of a conference with counsel and you advised me you did not, that it's your own humble opinion. Now I ask you if those things about which you refused to testify are acts which will incriminate you or implicate you in an income tax liability, your own income tax liability?"

Do you remember his answer to you then?

(527) A. Would you read the question again, counselor?

Q. The question was:

"Q. Well, you are the one whose opinion is being examined."

THE COURT: Whose what? Read that again. You are the one whose opinion?

Q. "Well, you are the one whose opinion is being examined. You stated that in your opinion you felt that you might incriminate yourself. I have asked you if you make that statement as a result of a conference with counsel and you advised me you did not, that it's your own humble opinion. Now I ask you if those things about which you refused to testify are acts which will incriminate you or implicate you in an income tax liability, your own income tax liability?"

Do you remember you asked him that question?

A. Yes.

Q. Now, his answer was as follows:

"A. Mr. Shipley, I think my entire record in business, which you have reviewed from 1944, 1945, 1946, and perhaps back to 1942, when I started in business, proves conclusively that I don't mean to hide anything. I have shown you everything I possibly had that you asked (528) for me to show you. I have gone along and given you all the information I possibly could, and evidently you have found everything satisfactory, other than the questions that you are asking me about."

Do you remember that was his answer?

A. I believe that was his answer.

Q. Now, just a few more questions, because I have to get on. By the way, he described Levenson to you, didn't he, told you what he looked like?

A. Yes.

Q. There are just two more questions I wish to ask you on this phase. Will the Court indulge me for a minute?

Here is the question, No. 246:

"Q. Then why any hesitancy concerning testimony of acts you made for Levinson or Schwartz or Kaufmann or whoever you were making them for?"

Do you remember his answer then?

A. Something to the effect that he didn't get anything out of it and he didn't want to get mixed up in it, something like that.

Q. I will read you his answer then:

"A. Because, as I said before, they might tend to implicate me, and not having received any monies from (529) this, I don't care to answer any questions that may tend to implicate me, not knowing the law and not being represented by a lawyer at this time."

Do you remember he answered that?

A. I believe that is right.

Q. Then do you remember you asked him this question:

"Q. Would you wish to be represented?"

Do you remember how he answered that?

A. No, but it speaks for itself.

Q. All right, his answer was, when you asked him, "Would you wish to be represented?"

He said:

"A. I don't think it's necessary. Everything I have to say is open and above board excepting the few questions that may implicate me or tend to implicate me or incriminate me —whichever the term is."

And then you asked him whether he accompanied anyone to the check cashing agencies when those persons cashed checks made payable to Charles Schwartz or Levenson, and that he refused to answer at that time; is that correct?

A. I don't know whether he refused to answer or whether he said that he himself didn't ——

Q. Well, he refused to answer. He said:

(530) "I do not wish to answer that question."

Now, I suggest to you, wasn't the defendant afraid, as he himself told you at that time, that Levenson, Schwartz, Kaufmann, might tend to implicate him? Didn't he tell you that then?

A. That what? That Levenson, Schwartz, and Kaufmann ——

Q. Or Kaufmann might tend to implicate him?

A. No. I don't understand it that way.

Q. Well, didn't he tell you that?

A. No, I don't think that is exactly what he said.

Q. Well, now, I will read you his answer. You asked him this question:

"Q. Then why any hesitancy concerning testimony of acts you made for Levinson or Schwartz or Kaufmann or whoever you were making them for?"

Now, he answered then—this is his exact answer ——

"A. Because, as I said before, they might tend to implicate me, and not having received any monies from this, I don't care to answer any questions that may tend to im-

plicate me, not knowing the law and not being represented by a lawyer at this time."

Are you satisfied that is his answer?

(531) A. That is his answer, but I don't take the inference out of it that you do. I am asking the questions and he answers there.

Q. All right, I will leave it for the jury as to that. Now, you did ask him whether he wanted a lawyer, whether he wanted to be represented?

A. Yes.

Q. And he told you then he didn't think it was necessary; is that correct?

A. Yes, sir.

Q. And then he signed this statement; am I right?

A. Yes, sir.

Q. And you had warned him that anything he said could be used against him?

A. Yes.

Q. That he doesn't have to sign, he doesn't have to answer anything, is that right, but, nevertheless, he did; am I right?

A. He did.

Q. Now, let us come back to the trial last time, two years ago. You were sitting there; am I right?

A. Here?

Q. Here.

A. Yes.

Q. You were also sitting there (indicating).

(532) A. Yes, sir.

Q. Now, when you were sitting here and you heard Mrs. Mandelbaum or Peggy Diamond, as she called herself, when she stated from the stand that he was introduced as Mr. Swidler, did you say anything? Was there any question of that fact at that time?

MR. LEES: What does that mean? I will object. I don't understand the question.

THE COURT: Sustained.

BY MR. KOSSMAN:

Q. When Mrs. Peggy Mandelbaum testified last time at the trial, do you remember she said at that time that Mr. Swidler was introduced to her as Mr. Swidler? Do you remember her saying that?

A. I read the testimony which says that.

Q. Even if you hadn't, I am asking your memory. Don't you remember she said that?

A. Yes.

Q. Did you question that statement that she made under oath at that time, two years ago?

A. Did I question it?

Q. Did the Assistant District Attorney question it?

A. Ask the Assistant District Attorney.

(533) Q. He is not here.

A. Well, I can't answer what he said.

Q. You know whether he questioned that statement or not. Did he say to her, "Mrs. Diamond, that is not a correct statement"?

A. You mean questioned the witness or questioned in his own mind?

Q. No, questioned the witness. I don't know what takes place in a man's mind unless he expresses it.

A. Neither do I. That is what I want to get straight.

Q. Did he question it when she said it then?

A. Well, counselor, I can't help on that. I really don't remember what he said. The questions that he put to the witness, I think the record will show. I don't recall exactly what they were. I think he did make an attempt, after she made that answer, to question her otherwise, to try to get a different answer. I think he may have.

Q. Well, on page 111—this is direct examination by the Assistant District Attorney. He asked Mrs. Mandelbaum:

"Q. Was he introduced to you by the name of Mr. Swidler or what?"

Her answer then was:

"By the name of Mr. Swidler, right."

The District Attorney then said:

(534) "Q. Continue. What happened up in the show room?"

And there was no attempt made at that time or any time prior to this trial to show that Mrs. Mandelbaum regarded Mr. Swidler as anybody but Mr. Swidler.

Now, does that clear that up in your mind?

A. Does what clear what up in my mind?

MR. LEES: I am going to object to these questions about Mrs. Mandelbaum's testimony at a prior trial, sir. He can answer here about this case.

MR. KOSSMAN: I have a right to ask the man who investigated the case, on his credibility and his memory, something that happened two years ago, whether he has testified about something that took place five years ago.

THE COURT: Oh, no, it doesn't reach that quality at all. You are questioning him what steps were taken by an official over whom he can't possibly exercise any control. I sustain the objection.

BY MR. KOSSMAN:

Q. Well, I will put it this way, then: Did you call the attention of the Assistant District Attorney at that time to the fact that Mrs. Mandelbaum was saying something that was incorrect? I ask you what you did.

A. I attempted to get the Assistant United States Attorney's (535) attention at that time, but I got no opportunity to talk to him because he was listening to the wit-

ness' testimony and he made motions to me to be quiet so he could hear.

Q. How about when she was being cross-examined and the Assistant District Attorney wasn't engaged in asking any questions? You had your opportunity then?

A. The same thing applied. When I attempted to get the attorney's attention, he was interested in the questions of the defense counsel and made motions to me not to interrupt him, not to bother him.

Q. Now, you heard Mrs. Mandelbaum testify that she did call that particular number but no one answered; am I right?

A. I think she gave two answers, that she attempted on a couple of occasions. Once she got somebody that said that Levenson wasn't there, and once something about the number didn't answer.

Q. The second time she testified he wasn't there. The first time she testified she called the number and got no answer; am I right?

A. I know there were two different answers she gave counsel. What the detail of them exactly ——

Q. I suggest to you this: Despite the effort that has been made in this case in just one or two items, one or two people out (536) of all the people, to show that he posed as Mr. Schwartz or Levenson or what not, I suggest to you that during the first trial the record shows conclusively, proves conclusively, that nobody then identified him or said that he pretended to be Schwartz or Levenson or anybody else; is that true?

MR. LEES: I object.

THE COURT: Sustained. I don't want any speeches. You have objected and I have sustained it. Now let us go on from there.

BY MR. KOSSMAN:

Q. Now I will ask you this question: Did you hear His Honor, the Judge, during that trial say, and I am reading exactly what was said:

"I think it is only fair to say that I have not heard anyone on this witness stand in this case who has said that this defendant ever represented his name to be other than his own. I think, in fairness to the defendant, that that is the testimony that is before you in this case. However, the testimony is all for you to consider, and that is purely a personal observation of the trial judge which is not binding on you."

MR. LEES: I object to that.

THE COURT: I made that observation in fairness (537) to the defendant. If you want another observation at the conclusion of this case about what has happened in this trial, I will also make it, but it won't be in fairness to the defendant.

BY MR. KOSSMAN:

Q. Well, now, there was no attempt at that time to take any exception to that remark, was there, that you are aware of?

All right, I will withdraw the last part of the question.

THE COURT: Mr. Kossman, nobody could take exception to that remark because I told—that is out of my charge, isn't it?

MR. KOSSMAN: Yes.

THE COURT: I was then speaking to the jury at the conclusion of the entire case, and certainly in that case and in this case and in every case, if there is any inference that

is favorable to a defendant, I will see that he gets the benefit of it.

BY MR. KOSSMAN:

Q. Now, you interviewed Mr. Cohen, didn't you?
A. Yes, sir.
Q. Am I right?
A. You mean Samuel Cohen of Bridgeport Luggage?
Q. When was the first time you interviewed Mr. Cohen?
(538) A. I couldn't answer that without quite some thought, counselor.
Q. Well, when you came to see Mr. Cohen you knew the goods had been shipped from the Bridgeport Luggage; is that correct?
A. Yes, sir.
Q. Is that right?
A. When I first came to see Mr. Cohen?
Q. Yes.
A. Yes, sir. You mean at the Bridgeport Luggage?

THE COURT: Read the question so I can understand and follow: Read them both. I would like to follow the continuity of it, the previous question, the answer, and then the succeding part.

(The last three questions and answers were read by the reporter.)

THE COURT: Start all over. That doesn't make any sense.

BY MR. KOSSMAN:

Q. You went to see Mr. Cohen; is that correct?
A. At the Bridgeport Luggage Company.

Q. Yes.

A. Yes, sir.

Q. Mr. Cohen told you he made no profits out of these (539) transactions; is that correct?

A. That is correct.

Q. And he told you that the Bridgeport Luggage Company made no profit out of any of these transactions that we have discussed; is that correct?

A. That is correct.

Q. You went to see Mr. Bassen and Mr. Brodsky in New York?

A. Yes, sir.

Q. And they told you they made no profits; is that correct?

A. Profit out of what?

Q. Out of these transactions.

A. They were not asked a question like that and they didn't answer a question like that. They told me that they permitted the storage of merchandise, otherwise, a drop in New York of merchandise from the Pacific Mills, to be stored in their place. Mr. Brodsky said that it became a nuisance, and then he called on his nephew to intercede with him to have the merchandise dropped at his premises, and that happened, and he no longer had the nuisance value of the merchandise coming into his place of business.

Q. Did you investigate Mr. Cohen's persoal bank account?

A. I personally?

Q. Yes.

(540) A. I didn't have that assignment.

Q. I beg your pardon?

A. Oh, you mean his personal bank account?

Q. Yes.

A. Well, let me say this, not quite in that manner, but I did have a schedule shown to me by another agent who had examined Mr. Cohen's personal bank account.

Q. You yourself didn't personally examine it; is that correct?

A. I personally didn't examine Mr. Cohen's income tax liability.

Q. Do you know whether in your investigation of Mr. Cohen you discovered whether he had any vaults or not?

A. Any what?

Q. Vaults, bank vaults.

A. I don't know whether he did or not.

Q. Your answer is you don't know whether he had or whether he didn't have?

A. Unless I am working on the income tax investigation myself, I am not informed.

Q. Oh, I see. You were not investigating the income tax liability of Cohen?

A. No, sir, I was assigned to somebody else, if there were one.

Q. Now, Mr. Cohen at that time told you that he did all this (541) because he was a friend of Mr. Swidler?

A. Yes. I think he said that they were friends from school days.

Q. And that is why he did it, is that correct, all these transactions?

A. Well, I can't say that he said that is why. He didn't say that is why he did it. He said that he knew Mr. Swidler for a great number of years and he did it through friendship.

Q. But he made no money out of it? That you are positive he said?

A. Oh, yes, he told me he made no money out of it.

Q. Would you know whether Mr. Cohen had about $90,000 in his bank account, from the other agent, at that time—personal bank account?

A. I would have no knowledge.

Q. By the way, you also spoke to Gilbert; am I right?

A. Interviewed Mr. Gilbert?

Q. Yes.

A. Yes, sir.

Q. You heard Mr. Gilbert at the first trial say that he only saw Mr. Swidler twice; is that correct?

A. I think that is correct.

Q. You heard him say at the second trial that it was six or (542) eight times or something like that; is that correct?

A. Well, as I recall it, he and you were in an altercation of some kind, and he gave you some answer like two, four, six, or eight or something like that. That is the best of my recollection. He didn't give any specific number.

THE COURT: What has that to do with this witness? What is the relevancy of asking that question?

BY MR. KOSSMAN:

Q. When Mr. Gilbert first stated in court under oath in your presence that he was there twice, that he only saw Mr. Swidler twice, did you at that time try to communicate to the Assistant District Attorney that that was not a correct statement, or did you recognize, when he made that statement under oath, that it was the truth?

A. I had before me, like now, copies of the statements that they made to me in the field, and I exposed that and pushed it over for the District Attorney to see when the witness was on the stand. Now, what Mr. Bowen's cognizance was of that I can't answer. Mr. Bowen will have to answer that.

Q. All right, that is your answer. I just have another question or two. This morning you were asked this question:

"Q. Did you ask Swidler if he ever sold any goods to Bader-Diamond?"

And your answer today was:

(543) "No, sir, I did not. I did not."

Is that correct?

A. I am saying that I did not ask him a question.

Q. You were asked the question this morning by the

Assistant District Attorney—well, I will give you the previous question:

"Q. Did you ask him if he knew Peggy Diamond, Bader-Diamond?"

You answered:

"I did."

You were then asked:

"What did he say about that?"

Your answer was that he had said he didn't recall.

Is that correct?

A. I think that is correct.

Q. It was that one transaction with Mrs. Peggy Diamond. The question this morning was:

"Q. He didn't recall what?

"A. I asked him if he knew Peggy Diamond, and he said he didn't recall. I said 'Peggy Diamond of the Bader-Diamond Company in New York.' He didn't recall."

Then you were asked this question by the Assistant District Attorney:

"Q. Well, did you ask him if he had sold any (544) goods to Bader-Diamond?"

And you said then:

"No, sir, I did not. I did not."

Is that correct?

A. Is what correct?

Q. That you never asked him if he had sold goods to Bader-Diamond.

(No answer.)

Q. Well, that is what you testified to this morning.

A. I distinctly recall that I asked him if he knew Miss Diamond of Bader-Diamond, but I don't recall whether I asked him as a question in the statement following that, as to whether he sold her merchandise or not.

Q. You did this morning. You were asked this question, whether you ever asked him, and you replied you did not.

A. That may be, but I feel that my memory has been refreshed, counselor, with your going over that statement,

and I might be able to answer a little better now than I was this morning.

Q. Do you mean to say that when you testified this morning you were not sure of what you were testifying?

A. Oh, I was trying to give you the most truthful answer I could, but now that you have vivified my memory going over that statement, I took in 1949, I seem to think that I may have asked (545) the taxpayer if he had ever sold merchandise to Bader-Diamond or to Peggy Diamond. I may have, but I may have answered contrary to that this morning, yes, sir.

Q. I am only referring you to the way you answered this morning. That is all I can go by. I mean you said this morning that ——

THE COURT: What is the question?

MR. KOSSMAN: The question was ——

THE COURT: What is the question, not what was the question. What is your question now to this witness?

BY MR. KOSSMAN:

Q. The question is now, isn't it a fact that in answer to the question by the Assistant District Attorney whether you had asked Swidler if he had ever sold any goods to Bader-Diamond, you replied, "No, sir, I did not. I did not."

Isn't that the way you answered this morning?

A. It is a little confusing the way you are asking me, but if you mean on direct examination this morning that I said that I had failed to ask Mr. Swidler in the 1949 interrogation as to whether he sold merchandise to Peggy Diamond, I may have answered that this morning, that I did not ask him.

MR. KOSSMAN: I have no more questions.

THE COURT: We will recess, members of the jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 70

DAVID SWIDLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The *per curiam* opinion of the Court of Appeals (Pet. 27-28) is reported at 220 F. 2d 351.

JURISDICTION

The judgment of the Court of Appeals was filed March 22, 1955. (Pet. 28-29.) A petition for rehearing was denied on April 15, 1955. (Pet. 30.) The petition for a writ of certiorari was filed on May 12, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction.

2. Whether the trial court correctly charged the jury concerning the theory of the case.

3. Whether rulings, comments and conduct of the trial court deprived petitioner of a fair trial.

STATUTE INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On March 6, 1952 (R. 1a)[1], an indictment was filed in the United States District Court for the Eastern District of Pennsylvania charging petitioner with willful attempted evasion of his income taxes for the calendar year 1945, in violation of Section 145(b) of the Internal Revenue Code of 1939. The single count of the indictment alleged that petitioner had filed a fraudulent income tax return stating that his net income was $4,601.47 and that the tax due was $765.36, whereas, as he knew, his net income was $110,516.01 and the tax due thereon was $78,199.73. (R. 2a.) At the conclusion of a second trial, the jury returned a verdict of guilty (R. 206a), and, on October 15, 1954 (R. 1a), petitioner was sentenced to ten months' imprisonment and a fine of $5,000.[2]

The evidence in support of the verdict may be summarized as follows:

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[1] In the Court of Appeals, both petitioner and the Government filed printed appendices containing portions of the reporter's transcript of the trial proceedings. The petitioner's appendix is composed of his main appendix and an "Additional Appendix for Appellant", which adopts and continues the pagination of his main appendix. Record references to the petitioner's appendix will be indicated "R.—a.". References to the Government's appendix will be indicated "R.—b".

[2] Petitioner was first tried and convicted on June 3, 1952. The trial court denied petitioner's motion for judgment of acquittal but granted his alternative motion for a new trial on December 4, 1952. (R. 1a.) The Court of Appeals dismissed petitioner's appeal from the order denying his motion for judgment of acquittal for want of jurisdiction. *United States* v. *Swidler*, 207 F. 2d 47 (C.A. 3d), certiorari denied, 346 U. S. 915.

During the taxable year 1945, petitioner was engaged with other partners in the manufacture and sale of maternity clothes under the trade name, "Mother Craft". (R. 63a, 170a). Petitioner's distributive share of the income of the partnership was reported on his individual 1945 tax return. (R. 109a.)

Quite apart from the business of the "Mother Craft" partnership, petitioner was engaged in the purchase and sale of piece goods in an individual capacity. (R. 5a, 87a; R. 10b, 15b, 21b.) He purchased these goods through one Samuel M. Cohen, a luggage manufacturer who was able to secure piece goods because he had a Government priority. (R. 5a; R. 1b.) The luggage manufacturer had originally ordered the goods for his own use and found them unsatisfactory, but continued to order them at petitioner's request. (R. 4a.) Cohen paid for these goods with money received from petitioner (R. 15a), and Cohen made no profit on the transactions (R. 41a). When goods were delivered to Cohen, petitioner took charge of them and directed their reconsignment to vendees, using the name "J. Levenson, 105 W. 40th Street, New York City", as the consignor. (R. 7a, 9a-11a, 19a, 58a.) Cohen's foreman, who handled the shipping of the goods, testified that petitioner was introduced to him as "Levenson". (R. 65a.) Some of the vendees who purchased these materials also knew petitioner as "Levenson". Petitioner was introduced to Milton Simon as Levenson (R. 3b), and Simon introduced him to another purchaser as

Levenson (R. 21b). The invoices for the materials in question bore the name "J. Levenson, broker, cotton and rayon piece goods, 105 West 40th Street" (R. 15b, 23b; R. 129a), or the name, "Charles Schwartz, 40 Worth Street, New York, New York" (R. 136a).

Although checks in payment of the merchandise were generally made out to Schwartz or Levenson, they were tendered to petitioner personally. (R. 18b, 34b.) One check was drawn to petitioner, was endorsed by him and his wife, and was deposited to their personal, joint bank account. (R. 129a, 161a.)

Petitioner personally made adjustments on sales of cloth which proved unsatisfactory (R. 26b), and on one occasion refunded the purchase price in cash (R. 8b). He also made price adjustments. (R. 19b.) When one of petitioner's customers found that she was unable to use cloth purchased from petitioner, she unsuccessfully attempted to contact "Levenson" at the telephone number shown on the invoice. (R. 24b, 26b.) However, after payment on the check was stopped, petitioner appeared. (R. 25b.) He assumed full responsibility and later found a buyer for the material. (R. 25b-26b.)

The names Levenson and Schwartz were unknown at the addresses shown for them on the invoices (R. 28b, 30b, 32b), and no such names were found in the 1945 Manhattan telephone directory at the addresses or with the telephone numbers indicated (R. 24b, 26b-27b, 36b-39b). A Treasury

Department agent searched in vain for the named individuals. (R. 188a-189a.)

Checks drawn payable to Levenson or Schwartz were cashed at check-cashing concerns in New York City. (R. 39b-43b; R. 150a.) The manager of one of these check-cashing services, Charlotte Mintz, thought that petitioner was Charles Schwartz because she was informed, in advance of petitioner's first appearance, that a man named Charles Schwartz was coming in to present a check for cashing. (R. 151a, 157a.) When cashing Schwartz or Levenson checks, petitioner was always accompanied by one or two other men. One of these men, petitioner introduced as Levenson. (R. 152a-153a.) The checks, which were already endorsed when presented, were handed to the cashier by petitioner. (R. 151a.) Mrs. Mintz, when asked to whom the cash was paid over, testified, "Well, it was my usual practice to count out the cash before them and simply put it down. I would say that Mr. Swidler took the money, handed it to the other gentleman. I am not absolutely sure of who took it all the time. I wouldn't attempt to say." (R. 158a.) In a few instances, petitioner was not present when Levenson and Schwartz checks were cashed. (R. 157a.) During the year in question, petitioner also cashed a few personal checks bearing his endorsement. (R. 157a, 159a.) However, Mrs. Mintz paid little attention to the endorsement because petitioner had been highly recommended to her by a person in whom she had confidence. (R. 159a-160a.)

During the course of the investigation of his income tax affairs, petitioner denied having any transactions with Cohen other than one involving a $7,500 loan (R. 48b); denied ever using the name Levenson or Schwartz (R. 49b); and denied ever cashing any checks at a check-cashing service in New York City or accompanying anyone else who cashed a check at any such place (R. 46b-47b). When asked specifically about the Mintz check-cashing service, he declined to answer the agent. (R. 47b.) Petitioner advised the Government agent that he purchased piece goods from a man by the name of Levenson and that he understood that Levenson was employed by Schwartz. (R. 170a.) Petitioner denied receiving any income from checks made payable to Levenson and Schwartz. (R. 177a.)

The total price paid by petitioner for piece goods which were traced to the ultimate purchasers amounted to $33,614.07; the amount paid petitioner by those who bought the goods from him totaled $107,927.08. (R. 169a.)

Treating all the checks, including these payable to "Levenson" and "Schwartz" as income to petitioner, the Government computed his true income from this source, for 1945, to be $74,313.01. (R. 190a-191a.) His return for that year showed a net income of only $5,101.47, derived from his "Mother Craft" partnership. (R. 109a, 191a.)

Petitioner's motion for a judgment of acquittal at the close of the Government's evidence was overruled. (R. 193a-194a.) The defense then rested

without offering any evidence, and the jury returned a verdict of guilty. (R. 206a.)

ARGUMENT

1. Petitioner contends that the conviction is not supported by the evidence, urging (a) that the testimony indicates that the cash received by petitioner was turned over to someone else, and (b) that the evidence shows expenditures by petitioner in excess of gross receipts.

However, from the evidence outlined in the Statement, *supra,* it appears that the jury was fully warranted in returning its verdict of guilty. That the income from the checks drawn to Levenson and Schwartz represented income to petitioner can be inferred from page after page of the record. The jury's rejection of the improbable theory that petitioner acted only as a conduit was clearly in accord with the evidence.

Petitioner's second attack on the sufficiency of the Government's evidence (Pet. 12-14) assumes, *arguendo,* that he received and retained the proceeds of the checks in question. The suggestion is that the evidence shows expenditures by petitioner exceeding receipts by $22,000.

The argument has no foundation. The Government's case was based on particular transactions. It was able to trace the flow of the merchandise involved from the mills through petitioner to the ultimate purchasers. (R. 172a.) As to these transactions, a profit of $74,313.01 was realized on goods purchased for $33,614.07.

Petitioner, in stating that he purchased $130,000 worth of goods from the mills through Cohen (Pet. 12), actually becomes more deeply incriminated, for, if he sold the additional goods at the same profit as the others, his taxable income would reach a far higher figure. If, on the other hand, petitioner did not sell these other goods, they would represent an increase in inventory and would not decrease the net income otherwise established. The argument that the cost of additional purchases must be offset against the income on the transactions proved by the Government can be based only on the unlikely hypothesis that a complete loss was suffered on those purchases. Petitioner's statement (Pet. 13) that it was "incumbent on the Government to adduce further positive evidence as to what happened to the goods that were not sold, or if sold, who received the cash proceeds of those sales" is directly contrary to the well settled principle that the Government, once it establishes unreported income, need not prove a complete debit and credit account and need not prove the negative proposition that no offsetting losses were incurred. *United States* v. *Bender,* 218 F.2d 869 (C.A. 7th), certiorari denied, 349 U.S. 920; *United States* v. *Stayback,* 212 F.2d 313 (C.A. 3d), certiorari denied, 348 U.S. 911; *United States* v. *Hornstein,* 176 F.2d 217 (C.A. 7th).

Petitioner errs, moreover, in stating (Pet. 13) that the Government's approach was to "atomize" his business transactions by treating component

steps in an integral transaction separately. All of the transactions with which the evidence dealt were complete, the materials involved being traced from their purchase by petitioner to their purchase by the ultimate vendees. The proof of these transactions and the surrounding events overwhelmingly showed that petitioner received very substantial income for which he failed to account and that he took elaborate steps which can be explained only as an attempt at concealment.

2. Petitioner's contention that the District Court erred in failing to charge adequately as to the defense's theory of the case is without substance. The theory, as stated in the petition (Pet. 15), is that petitioner "had sold goods not for himself but on behalf of others; that his reason for doing this was to obtain merchandise for his own small business; that the profits from the transactions were not kept by him, but were turned over to other people." At the trial, defendant raised this point when he asked the court to charge (R. 205(a)):

> If Samuel Cohen and/or other individuals made money from the sales of the merchandise mentioned in this case and did not pay their income taxes, but the defendant did not personally attempt to evade a substantial amount of his own income tax, your verdict must be not guilty.

The court read this request to the jury and gave it explicit approval (*ibid.*). Petitioner requested no further instruction on his theory of the case as he,

indeed, concedes in his petition (Pet. 16-17). The court was scarcely obliged to seek a formulation of petitioner's theory more elaborate than that suggested by petitioner's counsel.[3]

3. Petitioner alleges a number of other errors which he claims had the effect of denying him a fair trial: that the trial judge asked improper questions of two Government witnesses (Pet. 17-20); that the trial judge made an improper comment reflecting on the credibility of certain witnesses (Pet. 21); that the court unduly restricted the right to cross-examine a Government witness (Cohen) by sustaining an objection to a question (Pet. 22); and that the court prejudiced petitioner by interrupting the summation of his counsel (Pet. 22-25).

These specifications were considered by the Court of Appeals which found (Pet. 28) that "the trial court's comments, rulings and charge did not deprive [petitioner] of a fair trial." While it is unnecessary to deal with these contentions at any length, we note (1) that the questions put by the court to the two Government witnesses (see R. 148a-149a) were perfectly proper questions designed to clarify the issues; (2) that the comment to which petitioner takes exception (see R. 186a) was a justified rebuke to defense counsel for attempting to put before the jury the court's instructions during the previous trial, and that it did not relate to the credibility of any witness; (3)

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[3] Cf. *Isaacs* v. *United States*, 159 U. S. 487; *Gicinto* v. *United States*, 212 F. 2d 8 (C.A. 8th), certiorari denied, 348 U. S. 884; *Stassi* v. *United States*, 50 F. 2d 526 (C.A. 8th).

that the court's limitation upon the cross-examination of Cohen was well within its discretion, *United States* v. *Stoehr*, 196 F. 2d 276 (C.A. 3d); and (4) that the court's interruption of the closing statement of petitioner's counsel, made in order to correct what appeared to the court to be a misstatement of fact (see R. 195a-197a), can scarcely be considered error in view of the broad discretion vested in trial judges in supervising arguments of counsel. *United States* v. *Ward*, 96 F. 2d 189 (C.A. 5th); *Mannix* v. *United States*, 140 F. 2d 250 (C.A. 4th).

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 346832 1907